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In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST N. MORIAL, ET AL
and the Class they Represent,

Petitioners

vs.

UNITED GAS PIPE LINE COMPANY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an economic interest continues to be sufficient for intervention as of right under Rule 24 of the Federal Rules of Civil Procedure?

2) Whether the equation by the Fifth Circuit of "interest" under Rule 24(a) with "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure is contrary to the underlying language and purposes of the two rules?

3) Is it proper to superimpose an "adequacy of representation" requirement on Rule 24(b) in the absence of statutory language?

4) Did the Court of Appeals improperly restrict review of a the trial court's denial of permissive intervention to a showing of "clear abuse"?

5) Did the Court of Appeals improperly ignore Louisiana state court decisions regarding a breach of power plant gas contracts and involving the same parties to this case in violation of the *Erie* doctrine?

6) Do the City Officials of New Orleans have the right or permission to intervene in a suit between an electric utility serving the citizens and the utility's major power plant gas supplier, where the only charge that is passed on to the Ratepayers on a dollar-for-dollar basis is the fuel cost, and where the City is co-plaintiff in a similar action in state court?

7) Do Ratepayers have the right or permission to intervene in a suit between a utility serving them and the utility's major power plant gas supplier, where the power

plant gas cost is the only charge that is passed on to the Ratepayers immediately on a dollar-for-dollar basis, and where the Ratepayers are co-plaintiffs in a similar action in state court?

8) Is an electric utility an adequate representative under Rule 24 to pursue this action for the Ratepayers?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ERNEST N. MORIAL, ET AL
and the Class they Represent,

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vs.

UNITED GAS PIPE LINE COMPANY,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ernest N. Morial, et al,[1] respectfully urge that a writ of certiorari issue to review the judgment

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[1] *List of Parties to Proceeding:* Ernest N. Morial, Joseph I. Giarrusso, Sidney J. Barthelemy, Bryan Wagner, James M. Singleton, Mike Early, Lambert C. Boissiere, Jr. and Philip C. Ciaccio are the Mayor and City Councilmen of the City of New Orleans and ratepayers of New Orleans Public Service, Inc. ("NOPSI"), a local utility providing gas service to the citizens of New Orleans and electric service within the city limits except an area called Algiers. The City of New Orleans (the "City") is a municipality which had rate regulatory authority over NOPSI through December 31, 1981. It exercises all other powers and authorities under its Home Rule Charter. *LA. CONST.* art. 6, §5. Ellis B. Rushing, William Schenker, Sr., Walter A. Kott, Sr., Joe Jopes, Tony Devoney, Tom Dunn, Roy Baas, The City of New Orleans, Bon Marche Homes, Inc., Maison Chatelain, Inc., Del Tynes, Associates, Don's Automotive Center, Heissers Auto Repairs, Sam Scandaliatos &

and opinion of the United States Court of Appeals for the Fifth Circuit rendered on June 21, 1984.

OPINIONS BELOW

The Appendix lists the various decisions and opinions previously issued in this matter. The decisions of the District Court, Appendices A and B, are unreported; the decisions of the Court of Appeals are reported as follows:

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JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment and opinion of the appellate court was entered on May 21, 1984, Appendix H, and rendered on June 21, 1984 by the denial of a timely petition for rehearing, Appendix I, and this petition for certiorari was filed within 90 days of that date.

(Footnote 1 continued)
Associates Consulting Engineers, and Party World are electric ratepayers of NOPSI (they and the other NOPSI ratepayers are hereinafter collectively referred to as the "Ratepayers"). The City Officials, the City and the other Ratepayers are applicants for intervention. United Gas Pipe Line Company, a wholly-owned subsidiary of United Energy Resources, Inc. is the Defendant/Respondent herein. NOPSI is the Plaintiff in the suit pending in the District Court, but not a party to this petition.

STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 24 in pertinent part provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

New Orleans Public Service, Inc. ("NOPSI"), a local utility serving the citizens of New Orleans with gas and

electric service, entered into a contract for the delivery of gas-for-resale and power plant gas with United Gas Pipe Line Company ("United") on June 1, 1952 for a term through May 31, 1975. Only the provisions applicable to power plant gas are at issue herein. On January 31, 1975, NOPSI and United entered into a letter agreement amending the 1952 contract to regulate the sale of gas for the period remaining thereon and thereafter. The letter agreement contained a price redetermination clause, leaving the redetermination of the price for power plant gas to United's discretion, NOPSI having only the right to either pay or to seek the purchase of power plant gas elsewhere. This letter agreement was subsequently amended upon two occasions, which amendments are not relevant to this Petition. On March 3, 1981, United gave notice to NOPSI that it planned to institute a new price for power plant gas which NOPSI thought to be unreasonably high. Facing the dilemma of either agreeing to the new price or not being delivered power plant gas at all, NOPSI ultimately signed the new price redetermination letter under protest.

Power plant gas is used to generate electricity which is delivered to the Ratepayers by NOPSI. The price of power plant gas is not regulated, either by the Federal Energy Regulatory Commission ("FERC") or by the regulator of NOPSI, the City or, subsequently, the Louisiana Public Service Commission ("LPSC"). The total cost of this power plant gas is paid as a surcharge (fuel adjustment charge) by the Ratepayers to NOPSI who transfers these funds to United in payment of the power plant gas delivered. NOPSI does not receive a profit (rate of return) on the fuel adjustment charge, which is billed separately to the Ratepayers, in addition to the base rate. The fuel adjustment charges represent 60% of the total cost of electricity to the Ratepayers. This is the *only* item that is

charged *directly* to the Ratepayers. All other charges are reflected in the base rate and are *not* separately listed on the bills. The fuel adjustment charge per kilowatt hour fluctuates from month to month; the base rate, however, does not. Petitioners estimate that they have suffered damages in the amount of $11 million in the year following May, 1981 alone, and that these damages have continued to accrue in the millions thereafter.

NOPSI filed suit in state court on May 26, 1981. It admitted that it did not suffer monetary damages as a result of the excessive price increases, stating that it had acted to "avoid the hardship which would result to its customers and the resultant damage to NOPSI's public image and reputation..." (Plaintiff's Complaint at Paragraph 10). It alleged that the price increase was obtained under duress and that the price redetermination clause is invalid under the Louisiana Civil Code. NOPSI sought to have the court determine a reasonable price for the power plant gas and to obtain a refund of the overcharges *to the utility* from United. United removed this suit to federal court claiming diversity of citizenship and jurisdiction under the Natural Gas Act, 15 *U.S.C.* §717-717w. United also filed a counterclaim, alleging that if the price redetermination clause was invalid under Louisiana law, it would be entitled to receive the "market" price for all power plant gas delivered since June 1, 1975. Such claim, if successful, may result in damages to the Ratepayers far in excess of $11 million a year.

On August 26, 1981, Ernest N. Morial, Mayor of the City of New Orleans, and a Ratepayer, filed an application of intervention, which was amended on October 6, 1981 to add the seven City Councilmen of the City, the City itself, and a number of other Ratepayers. NOPSI never opposed

such intervention, but United did and continues to do so. Magistrate Livaudais of the Eastern District of Louisiana denied intervention as of right but allowed the City Officials to intervene permissively. Appendix A. Judge Lansing Mitchell, on appeal from the Magistrate's order, denied both the Ratepayers and the City Officials the right or permission to intervene, holding that they lacked sufficient interest and that the utility would adequately represent them. Appendix B. On appeal, a panel of the United States Court of Appeals for the Fifth Circuit held that the City Officials had sufficient grounds to intervene as of right and permissively, but denied intervention to the Ratepayers. Appendix C. Upon rehearing, the Fifth Circuit Court panel limited its decision to allow the City Officials to intervene permissively. Appendix D. A rehearing *en banc* was granted. The *en banc* court, with five judges dissenting, denied intervention as of right and permissively to the Ratepayers and to the City Officials. Appendix H. A petition for rehearing by Petitioners was denied. Appendix I.

The City Officials and the City of New Orleans sought to intervene, *inter alia*, as the regulatory authority of NOPSI during the time the bulk of the damages were incurred, i.e., through December 31, 1982. It also sought intervention as the representative of the Ratepayers, charged by its Home Rule Charter to protect the interests of its citizens. The Ratepayers seek to intervene as they are the only party who has suffered damages as a result of United's action, are continuing to suffer damages, and may have to pay astronomical amounts for the benefit of United if United is successful in its counterclaim.

An important legal issue presented in this writ is whether the Fifth Circuit refused to follow state court decisions involving the same parties. The 1952 contract is

involved in litigation in state court where NOPSI, the City and the Ratepayers recently obtained a $44.4 million judgment as *co-plaintiffs* against United for damages incurred as a result of shortages of power plant gas that United experienced on its system in the 1970's. Appendix J. Despite numerous attempts by United to have the City and Class of Ratepayers dismissed (see *infra* at p. 23), which resulted in judgments in favor of the City and the Class at the state trial, intermediate and supreme court level, the City and the Class are still co-plaintiffs in the state court proceedings.[2] What is more, the state trial court recognized (in separate Reasons for Judgment) that the Ratepayers had actually paid the $43.2 million representing the fuel adjustment charges which were ordered to be returned to the Ratepayers, and further that an amount of $1.2 million is a subject of contention between the Ratepayers and NOPSI to be resolved later.

All parties to this petition are represented by the same counsel in state court as well as in this proceeding. United relied on the same authorities and reasoning in state court as it does in this suit in federal court. Hence, even though both suits involve the standing of the City and Ratepayers in a breach of power plant contract action, the mere fact of diversity alone has deprived the Ratepayers of a forum to represent their own interests.

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[2] Louisiana Code of Civil Procedure, article 681, *La. Code Civ. Proc.* art. 681, provides: "Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." The redactors noted that Rule 17(a), *Fed. R. Civ. P.* 17(a) was one of the sources for this article.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S DENIAL OF INTERVENTION IS IN CONFLICT WITH THE STANDARDS APPLIED BY THIS COURT AND BY OTHER CIRCUIT COURTS. IT IS ALSO IN CONFLICT WITH THE *ERIE* DOCTRINE, AND IS CONTRARY TO STATE COURT DECISIONS.

The electric Ratepayers are a beleaguered, victimized lot, with numerous potential price increases due to a variety of reasons (expensive Canadian gas, abandoned, or enormously expensive nuclear plants) looming ahead. The reason that both United and NOPSI are regulated is a recognition of the profound public interest involved, where regulation is supposed to replace the market pressures of competition, and where the Ratepayers are captive consumers. The courts in Louisiana have always provided access and relief for ratepayers in those areas where regulation is lacking.

The price of power plant gas is not regulated, although the quantity is subject to curtailment orders of FERC and the service cannot be abandoned without FERC approval. If a controversy ensues in a regulated area, there are administrative avenues in which the Ratepayers and the City can participate as intervenors. Thus, the City of New Orleans is an intervenor in several proceedings pending before FERC which examine various acts of wrongdoing by United. If the controversy deals with wrongdoing by NOPSI, its regulator may allow the Ratepayers or the City to intervene. However, when the controversy falls within the interstices of an intricate web of state and federal regulation, the courts are the only place where the

Ratepayers or the City as their representative can get redress.[3]

The right to intervene encompasses the right to determine the scope of the proceeding, the right to make strategic decisions, and the right to pursue a claim vigorously. The City of New Orleans is the third poorest major city in the nation. The damages suffered by those who are poor, isolated and powerless weigh all the more heavily on them. Rather than recognizing the need of the Ratepayers to be represented, the Fifth Circuit excluded them from the judicial process altogether, holding that the utility, NOPSI, properly represents their interests and should pursue this action, even though no pecuniary damages were suffered by NOPSI and even though the City and the Ratepayers supplied instances of adversity in the appellate courts and vigorously argued that the utility was not a proper representative of the Ratepayers.

United likes to conjure up horror stories about consumers wishing to intervene in every controversy, small or large, NOPSI might have with its suppliers. This case presents a much narrower question. The charges of all suppliers, except the power plant fuel suppliers, are paid by the consumers in a base rate, which includes, in addition to these costs, a rate of return and other charges. However, the cost of fuel for the generation of electricity (and purchased power costs) are the only costs that are charged separately and directly. Hence, when a utility saves on the cost of insurance, construction, damage claims, repairs, etc., such savings will benefit the shareholders since NOPSI will continue to recover its base rates. But if

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[3] *City of New Orleans v. United Gas Pipeline Co.*, 438 So.2d 264 (La. App. 4th Cir. 1983), *writs denied*, 442 So.2d 413 (La. 1983).

NOPSI saves on fuel costs, there is no benefit to the shareholders, only to the Ratepayers. The converse of these examples is equally true. Thus the appellate court's conclusion that "[b]oiler fuel costs are not unique..." Appendix H at 79, is clearly incorrect as a matter of fact, and such error colored the court's entire analysis of the intervention question.

This case gives this Court the opportunity to give guidance in the area of intervention. The last time it spoke on the subject was in 1971, and federal courts have grappled with this subject ever since and have applied numerous, inconsistent standards to applicants for intervention. Further, this Court should reaffirm its unwavering insistence that the *Erie* doctrine be followed, to avoid a situation where the City and the Class are co-plaintiffs in state court in a breach of power plant gas contract controversy with United, while the federal court does not even grant them the status of intervenor!

I. INTERVENTION AS OF RIGHT: RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Under Rule 24(a), *Fed. R. Civ. P.* 24(a), applicants for intervention must seek leave timely. The timeliness of the application has never been disputed either by United or the courts. Further, applicants must have an "interest in the property or transaction" comprising the subject matter of the main action, show that in their absence disposition of the action would impair their interest, and that they are not adequately represented by the present parties. The Fifth Circuit held that even though the Ratepayers and the City had a "substantial," "direct" and "economic interest," it was not "legally protectable." The court failed to address the other requirements of Rule 24(a).

The Fifth Circuit fashioned new jurisprudence when it added additional dimensions to the word "interest," essentially holding that an intervenor must show that he is really a plaintiff or a defendant.

The Ratepayers and the City submit that this result is, in the words of the dissenting opinion, "lamentable," Appendix H at 90, and an unprecedented and unwarranted restriction of the Rule, making the Rule unworkable. This case offers a classic example how an overly strict interpretation of the Rule leaves deserving parties without a forum of redress.

A. The United States Circuit Courts of Appeals are in Disarray as to the Definition of "Interest" for Purposes of Rule 24(a)(2)

1. *Supreme Court Decisions*

Since the 1966 amendment to Rule 24, the Supreme Court has explicitly considered the elements of the "interest" requirement under Rule 24(a)(2) only twice. See *Donaldson v. United States*, 400 U.S. 517 (1971); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

In *Cascade* the Court held that the State of California (filing on behalf of the consumers and distributors of natural gas), Southern California Edison Company (an industrial consumer), and Cascade Natural Gas Corporation (a distributor) were entitled to intervene as of right in connection with the divestiture of a pipeline by El Paso Natural Gas Company.

This Court did not discuss the meaning of "interest" under Rule 24.

It should be noted that this Court had no problem allowing the State and the consumers to intervene. This precedent seems to mandate intervention in the instant case; however, the Fifth Circuit distinguished *Cascade* and held that the state's interest in freedom of antitrust injury provided the statutory basis on which this Court decided *Cascade*. The appellate court was silent on the consumer's interest. No other court nor any of the commentators have made this distinction. In the instant case, the lack of proper competition (United being the only major pipeline able to deliver significant quantities of powerplant gas and the Ratepayers have no freedom to choose another supplier of electricity) caused the damages. The interest of the City and its citizens to be free of injury due to unreasonably high electric rates is certainly equally deserving of protection as the freedom of "antitrust injury."

The Court's next and only other explication of the interest requirement of Rule 24(a)(2) appears in *Donaldson v. United States*, 400 U.S. 517 (1971). In *Donaldson* the court faced the issue of whether an individual taxpayer, Donaldson, who was under investigation by the Internal Revenue Service, could intervene as of right in a summary proceeding brought by the United States against Donaldson's former employer and the employer's accountant for records reflecting payments to Donaldson. The Court, in rejecting Donaldson's claim, noted that Donaldson's "interest" was not the type of interest within the meaning of Rule 24(a)(2) to permit intervention as of right, and in its most explicit explication of that interest to date held that "[w]hat is obviously meant there is a significantly protectable interest," 400 U.S. at 531, emphasizing that the taxpayer had a number of other proceedings pending in which he could protect his interests.

Given this paucity of explication by the Court, it is not surprising that the courts and commentators alike have found that *Cascade* and *Donaldson* have created more questions than they answer regarding the meaning of interest under Rule 24(a)(2). 7A Wright & Miller, *Federal Practice and Procedure* §1908, at 502 (West 1972). *Cf.* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶24.07[2] at 24-57 to 24-60 (2d ed. 1982).

Only one other Supreme Court case addresses any of the requirements of Rule 24, *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). In that case a union member was allowed to intervene as of right despite the fact he had no standing to bring the suit under Rule 17. The Court found that the Secretary of Labor could not simultaneously serve the public and private interest. NOPSI cannot properly serve two distinct interests, that of its shareholders and that of the Ratepayers. Thus, the Ratepayers likewise deserve the right to intervene.

2. Interpretation of "Interest" by the Various Circuits Prior to this Case

Initially, the federal courts took two approaches in interpreting the interest requirement of Rule 24(a). Under the restrictive view, in order to intervene in a litigation one must have a "direct, substantial, legally protectable interest in the proceedings." *See Hobsen v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968) (seminal case), *remanded on other grounds sub nom., Smuck v. Hobsen*, 408 F.2d 175 (D.C. Cir. 1969) (*en banc*). This definition of interest developed under the former Rule 24(a)(2) which required "a specific legal or equitable interest in the chose," *e.g., Toles v. United States*, 371 F.2d 784, 786 (10th Cir. 1967).

This formula for determining whether an "interest" for purposes of Rule 24(a)(2) is present in a given case is followed to some extent in the Second Circuit, *see Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984) ("interest must be direct, as opposed to remote or contingent"), *but cf. Rios v. Enterprise Association Steamfitters Local*, 520 F.2d 352, 357 (2d Cir. 1975) ("these cases hold that something less than "a specific legal or equitable interest in the chose' is sufficient"), and in the Seventh Circuit, *see Lake Investors Development Group, Inc. v. Egidi Development Group*, 715 F.2d 1256, 1258-59 (7th Cir. 1983) (interest must be direct and substantial), *quoting, Meridian Homes Corp. v. Nicholson W. Prassas & Co.*, 683 F.2d 201, 203 (7th Cir. 1982).

The more realistic and appropriate concept of the interest requirement under Rule 24(a)(2) rejects the notion that only the *res judicata* element of the prior Rule was eliminated by the 1966 amendment and holds that the expansive views of "interest" developed under the pre-1966 Rule 24 still apply and moreover, that the amendment liberated the courts from preoccupation with the technical "interest in the chose" question. This approach was enunciated in *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) and looks to the policies behind the interest requirement as the touchstone for determining whether the requirement has been met.

This is now followed in the Tenth Circuit, *see Sanguine Ltd. v. United States Department of Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984) (quotes *Camp* directly); *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 850 (10th Cir. 1981) (same), in the Eighth Circuit, *see S.E.C. v. Flight Transport Corp.*, 699 F.2d 943, 949 (8th Cir. 1983) (quotes

Camp directly), and still in the District of Columbia Circuit, *see Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (quotes *Camp* directly).

In the Ninth Circuit, it is unclear which approach is taken because the circuit has adopted both without comment on the inconsistency. *Compare Westlands Water District v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (direct, non-contingent, substantial and legally protectable interest required), *and Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981) (per curiam) (Judges Choy, Nelson, Schnacke) (same), *with County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (Judges Choy, Nelson, Schnacke, opinion by Nelson) ("we have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest"), *and Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977) (same); *and Johnson v. San Francisco*, 500 F.2d 349, 352-53 (9th Cir. 1974) (same).

Some circuits have not attempted to define their criteria. These are the First Circuit, *see Moosehead Sanitary District v. S. G. Phillips Corp.*, 610 F.2d 79 (1st Cir. 1979) (insufficient interest found with no analysis of definition), the Third Circuit, *see McClune v. Shamal*, 593 F.2d 482, 485-86 (3rd Cir. 1979) (no analysis of interest requirement); and the Fourth Circuit, *see Fleming v. Citizens for Albemarle*, 577 F.2d 236, 238-39 (4th Cir. 1978) (sufficient public interest found without analysis of definition of interest).

It is thus clear that the guidance of this Court is necessary to obtain more uniform results.

3. The Fifth and Eleventh Circuits are the Only Circuits to Equate the Real Party in Interest Requirement of Rule 17 of the Federal Rules of Civil Procedure With the Interest Requirement Of Rule 24

The Fifth Circuit's holding in the instant case, that for a would-be intervenor to meet the interest requirement for intervention as of right under Rule 24(a)(2), the applicant must meet the real party in interest requirements of Rule 17, *Fed. R. Civ. P.* 17, Appendix H at 65, is clearly an unwarranted and erroneous restriction of the interest requirement under Rule 24(a). The results are disastrous in this instance. The Ratepayers do not have another forum to turn to: if they file in state court (where United's attack on their standing as parties-plaintiff has been successfully withstood), United will remove the suit to federal court, thus foreclosing the Ratepayers from protecting their own interest, having to leave this to their utility company which has interests adverse to that of the Ratepayers.

The Fifth Circuit bases its ruling in the instant case on its assertions made without analysis in *United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir. 1969) and *Piambino v. Bailey,* 610 F.2d 1306, 1321 (5th Cir.), *cert. denied,* 449 U.S. 1011 (1980), that the real party in the interest requirement of Rule 17(a) applies to intervenors. The only case cited for authority by the court in *936.71 Acres* is the pre-amendment Fifth Circuit case, *Celanese Corp. of America v. John Clark Industries,* 214 F.2d 559, 556 (5th Cir. 1954), *see* 418 F.2d at 556, and the only case cited for authority by the court in *Piambino* is *936.71 Acres, see* 610 F.2d at 1321. *Celanese* does not explicitly hold that the real party in interest standard of Rule 17(a) applies to pre-revision Rule 24(a)(2) intervenors, and no authority is cited

in the case for its statement that the intervenors "were neither indispensible nor necessary parties, and that, while the action of the court in permitting them to intervene in the suit was neither necessary nor proper, the defendant took no prejudice therefrom." 214 F.2d at 556.

The Fifth Circuit's jurisprudential Siamese twin, the Eleventh Circuit, recently followed *936.71 Acres* without analysis in the only other circuit case in point, *Athens Lumber Co. v. Federal Electric Comm.*, 690 F.2d 1364, 1366 (11th Cir. 1982). Thus, *936.71 Acres, Piambino, Athens Lumber* and the instant case represent the only reported cases to hold that the real party in interest requirement of Rule 17 is applicable to Rule 24(a)'s concept of interest.

The only other support the Fifth Circuit supplies for its decision in the instant case equating the interest requirements of Rule 17 with that of Rule 24(a) is *Donaldson's* statement that an intervenor's interest must be "significantly protectable" for intervention as of right. The Fifth Circuit presumed that this Court really meant "legally protectable" and in so doing bootstrapped the interest requirement of Rule 24 to the real party in interest requirement of Rule 17:

> It is apparent that the Supreme Court in *Donaldson* used "protectable" in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing "protectable" in that context.

Appendix H at 65.

The fallacy of the Fifth Circuit's reasoning is patent. First, if this Court in *Donaldson* had meant "legally

protectable" instead of "significantly protectable", it certainly would have employed the former term, given that cases both before and after the revisions to Rule 24(a) employed the "legally protectable" concept. *See, e.g., Hobsen v. Hansen*, 44 F.R.D. at 24. As Wright and Miller note "significantly protectable interest" did not change the nature of the interest. 7A Wright & Miller, *supra*, §1908, at 902. Damages of $11 million a year are certainly significant and therefore protectable.

Also, even if *Donaldson* meant "legally protectable," no case recognizing that concept as an element of the interest requirement of Rule 24(a) has equated that concept with the real party in interest requirement of Rule 17, except those discussed herein from the Fifth and Eleventh Circuits.

When the purposes of Rule 24(a)(2) and Rule 17(a) are compared, it is obvious that the notion of "interest" in Rule 24(a)(2) is quite different from that in Rule 17(a). If the Fifth Circuit's analysis is allowed to stand, Rule 24 is superfluous, since then all intervenors would be either indispensible or permissive joiners in the action. According to the Advisory Committee's Notes, the purpose of the real party in interest requirement of Rule 17(a) is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as *res judicata*." See *Notes of Advisory Committee on Rules*, 39 F.R.D. 69, 85 (1966).

Contrasting with the *res judicata* purpose and effect of Rule 17(a)'s concept of interest is Rule 24(a)(2)'s provision that sufficient "interest" is shown for purposes of intervention as of right where the applicant "is so situated

that the disposition of the action may as a practical matter impair or impede his ability to protect that interest..." *Fed. R. Civ. P.* 24(a)(2). (Emphasis added). The type of interest sufficient for intervention is thus of a completely different nature than "interest" necessary for standing as a plaintiff.

For these reasons alone, the court should reverse the Fifth Circuit's decision in the instant case, even if the Court does not wish to formulate a precise definition of "interest" under Rule 24(a) at this time.

4. The Petitioners Have a Sufficient Interest in the Litigation To Satisfy the Requirements of Rule 24(a)

The Fifth Circuit in the instant case stated without citation or support that "it is plain that something more than an economic interest is necessary" to meet the interest requirements for purposes of Rule 24(a). Appendix H at 65. It is obvious why no support was cited by the court for the proposition, for no reported case has found the presence of an economic interest on the part of would-be intervenor as wanting for purposes of Rule 24(a)'s interest requirement. See 7A Wright & Miller, *supra* §1908, at 503-506; *e.g., Commonwealth Edison Co. v. Allis Chalmers Manufacturing Co.*, 315 F.2d 564; 566 (7th Cir. 1963) (pecuniary interest "legally protectable" within meaning of pre-revision Rule 24(a)(2)), *cert. denied*, 375 U.S. 834 (1964). *Cf. Smuck v. Hobsen*, 408 F.2d at 179 (*Cascade* seen as expanding ambit of interest beyond economic interest).

However, there is also ample precedent that *less* than an *economic* interest is required for intervention as of right under Rule 24(a) when a high public interest is

involved, as in the instant case. *See* 7A Wright & Miller, *supra* §1908, at 502 ("a broad reading of the intervention rule was thought necessary in *Cascade* in order to protect the public interest in effective competition"); *e.g., Fleming v. Citizens for Albermarle,* 577 F.2d 236, 238 (4th Cir. 1978) (public interest in board of supervisors actions); *Smuck v. Hobsen,* 408 F.2d at 180 (interest of parents in policies of school board and education of children); *In re Franklin National Bank Securities Litigation,* 92 F.R.D. 468 (E.D.N.Y. 1981) (nonstatutory "right to know" sufficient for permissive intervention by consumers). The shift away from a purely economic interest to a public interest approach has been recognized by this Court in the analogous area of standing requirements for purposes of federal jurisdiction. *e.g., Sierra Club v. Morton,* 405 U.S. 727 (1972) (public interest in environment).

This Court already has more than once noted the danger of exploitation of consumers by natural gas companies. *See F.P.C. v. Louisiana Power & Light Co.,* 406 U.S. 621 (1972) (the purpose of the Natural Gas Act is to "protect consumers against exploitation at the hands of natural gas companies"). Where regulation is lacking, the court should be *more,* not less, solicitous to protect the consumers from the exploitation of a pipe line company.

5. The Interest Of The Ratepayers Is Impeded If Intervention is Denied

The focus of the inquiry should be whether or not the proposed intervenors' interests will be impaired or impeded if their interests are not protected. *See Smuck v. Hobson,* 408 F.2d at 179-80, ("interest ...may be a less useful point of departure than the second and third requirements of Rule 24(a), impairment of interest and adequacy of

representation"). In *Donaldson v. United States*, the court found that the interest of the plaintiff was protectable *in other proceedings*, and therefore, did not allow him intervention in the case before the court. 400 U.S. at 531. In *Cascade* and in *Trbovich*, intervention was allowed because of the impairment to the public interest in competition in natural gas pricing and to the private interest in union elections, where no other forum was available to the intervenors. Even the Fifth Circuit has recognized that where an intervenor does not have another forum for redress, intervention should be allowed. *Atlantis Development Corp., Ltd. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967).

The appellate court stated that the City or Ratepayers can seek a refund from NOPSI, once it has obtained a judgment. There may not be any judgment; moreover, the appellate court noted that it is "unclear" where the Ratepayers should claim such refund. Appendix H at 59, note 19. The court's refusal to have the Ratepayers or the City participate in the proceedings leading to a recovery only results in numerous other problems, which must ultimately be resolved by the courts anyway.

6. Even Under Rule 17 Standards the Petitioner is Entitled to Intervene Because Petitioner is a Third Party Beneficiary to the Contract Between NOPSI and United

It is axiomatic that the real party in interest requirement under Rule 17 is met where a party is a third party beneficiary to a contract. *See* Appendix H at 71; *Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400 (8th Cir. 1977).

The Petitioner is clearly a third party beneficiary of the contract between NOPSI and United Gas under Louisiana law.[4] As discussed *infra*, at 23, at least three Louisiana courts, including the Supreme Court, have so decided on the same legal authorities United presented in federal court. The Fifth Circuit, even though supplied with briefs and the judgments from the state courts, completely ignored the controlling impact of these proceedings.

B. The Holding of the Fifth Circuit Violates the *Erie* Doctrine Because the Louisiana State Courts Have Held That Petitioners Are Third Party Beneficiaries To A Power Plant Gas Contract.

It is now without peradventure that under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, a federal court sitting in diversity must follow the decision of the state supreme court as to an underlying issue of state law, and where the supreme court has not ruled, the decision of an intermediate appellate court of the state which has a binding effect on the trial courts within the appellate jurisdiction. *See Gooding v. Wilson*, 405 U.S. 518, 525 n. 3 (1971); *West v. A.T.&T. Co.*, 311 U.S. 223, 236-38 (1940); *Six Companies of California v. Joint Highway District*, 311 U.S. 180, 187-88 (1940); *Fidelity Trust Co. v. Field*, 311 U.S. 169, 177-80 (1940).

There are explicit rulings by the state courts in a breach of contract action involving the same 1952 power plant gas contract discussed by the Fifth Circuit in the instant case, where both the City and the Ratepayers are

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[4] *See: State of Louisiana ex rel. Guste v. Simoni, Heck and Associates, Inc.*, 331 So.2d 428 (La. 1976); *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d 874 (La. 1974); *Andrepont v. Acadia Drilling Co.*, 221 So.2d 347 (La. 1969).

co-plaintiffs with NOPSI. The plaintiffs sought damages as a result of shortages of gas on United's system in the early seventies. United consistently opposed the standing of the City and the Ratepayers. In *City of New Orleans, et al v. United Gas Pipe Line Co.*, No. 575-544, Civil District Court, Division J, the trial court entered a judgment dated October 1, 1981 ("...a class action can be maintained by the plaintiffs therein other than New Orleans Public Service, Inc. (NOPSI) and the peremptory exception Opposing Maintenance of a Class Action is overruled"); October 15, 1981 ("All Plaintiffs other than NOPSI...have a right of action against the Defendant, United Gas Pipe Line Company, and the Peremptory Exception of No Right of Action is overruled inasmuch as the Court is of the opinion that the parties have a *real or actual* interest.") (emphasis added). The Louisiana Fourth Circuit Court also rejected United's attack on the City and class' third-party beneficiary status. ("Finally, because we conclude rate payers are members of that class who may be beneficiaries of any damages for curtailment of service, we find no error in the ruling of the trial judge permitting class action") Judgment, November 28, 1981 No. 12,981 *et al.* The Louisiana Supreme Court denied writs, 407 So.2d 714 (La. 1981). Subsequently, the present regulator of NOPSI, the Louisiana Public Service Commission, sought to intervene in the state court suit, arguing that it has jurisdiction over any recovery. The state Fourth Circuit Court denied intervention to the LPSC, as a damage action was outside the LPSC's jurisdiction, and the Ratepayers were proper parties in the litigation. 438 So.2d 264, *writ denied*, 442 So.2d 463 (La. 1983). *See also City of New Orleans v. United Gas Pipe Line Company*, 390 F.Supp. 861 (E.D. La. 1974) (Federal Court has no jurisdiction over the controversy, as diversity of citizenship was lacking). After 2-1/2 years of trial, 42,000 pages of testimony, 1744 exhibits and more

than 70 witnesses, the state trial court rendered a judgment on August 24, 1984, Appendix J in the amount of $44.4 million in favor of the City, the Class and NOPSI, despite United's vigorous arguments that the City and the Class should be dismissed for lack of standing.[5]

A state court's determination based on state law should be followed by federal courts, particularly in the circumstances of this case. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). For the foregoing reasons, it is obvious that this decision violates the clear requirements of the *Erie* progeny by even considering the third-party beneficiary issue in the instant case and by ignoring the decisions of the Louisiana courts as to the same parties and similar operative facts as are present in this diversity suit. In the alternative, the appellate court should have stayed these proceedings.

C. Denial of Permission to Intervene Pursuant to Rule 24(b) on Grounds of Adequate Representation was Clearly an Abuse of Discretion Herein.

Intervention pursuant to Rule 24(b)(2) was denied because, as the court speculated, with evidence *to the contrary* in the record, NOPSI would adequately represent the City Officials and the Class herein. That conclusion is both legally and factually incorrect.

For purposes of Rule 24(b)(2), the adequacy of representation is essentially irrelevant. *See Fed R. Civ. P.* 24(b)(2); *United States v. Columbia Pictures Industries*, 88 F.R.D. 186 (S.D. N.Y. 1980); *Groves v. INA*, 433 F. Supp.

[5] United seeks now to dismiss the City and Ratepayers from the state court suit despite the award of $44.4 million in damages, by claiming that the state court should adopt the federal appellate Court's decision in the instant case, even though the federal courts ignored the Louisiana state court decisions.

877, 888 (E.D. Pa. 1977). *See also In re Cochise College Park Inc.*, 703 F.2d 1339, 1346 (9th Cir. 1983) (class permitted to intervene solely because of existence of common questions of fact and law). Rather, decisions to grant permissive interventions should analyze whether there is a common issue of law or fact. The appellate court stated that this was so. There is no statutory or jurisprudential authority suggesting that the representation question enters in an evaluation of whether permissive intervention should be allowed.

D. The Detriment to the Ratepayers Outweighs Any "Prejudice" to United.

The appellate court also found that intervention would "diminish the original parties' rights," Appendix H at 85. The reasons on which it finds that the parties' rights are "diminished", are the very reasons, but not the only ones, why the Ratepayers or the City should intervene. NOPSI's rights are not diminished, as they welcome the Ratepayers and the City in the lawsuit. Thus, the appellate court extends the protection to United, the party who is accused of breaching the contract and causing the resulting damage to the Ratepayers. However, the appellate court failed to analyze why United is so adamant in fighting intervention in the various cases accusing it of breaches of contract. There are at least 3 other suits pending by Middle South Utilities operating companies against United seeking a total of $750 million in damages for various breaches of powerplant supply contracts.[6] All of these charges have been passed on to the Ratepayers. In

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[6] a) *City of New Orleans, et al v. United Gas Pipeline Co.*, Civil District Court, Parish of Orleans, State of Louisiana, judgment $44.4 million (plus interest from 1974), App. J;

all suits, *but this one*, the consumers themselves, or their representatives (the City of New Orleans, state Public Service Commissions, or the State of Mississippi, despite the lack of regulatory authority) are either co-plaintiffs or intervenors. The case at bar is the *only* case where no representative of the public is present. However, this decision may have far-reaching effects on the other cases pending in federal courts. Since United changed its citizenship to the State of Delaware, and its service area remains in the Gulf South, all future suits will be removed to federal courts and thus United is able with impunity to breach its contracts in the secure belief that it will never have to face the wrath of the Ratepayers themselves, but that it can safely deal with one or more of the subsidiaries of an electric utility conglomorate, whose damages are limited to speculative "damages to their reputation."

The Fifth Circuit, in denying permissive intervention, introduced a new test restricting the appellate court's

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(Footnote 6 continued)

b) *Louisiana Power and Light Co. v. United Gas Pipeline Co., No. 579-040*, consolidated with *City of New Orleans*, judgment for $40 million (plus interest from 1974);

c) *Mississippi Power and Light v. United Gas Pipeline Co.*, Civil Action J74-185(c), U.S.D.C., S.D. Miss., seeking $650 million. *See MP&L v. United Gas Pipeline Co.*, 532 F.2d 412 (5th Cir. 1976) *cert. denied*, 429 U.S. 1094 (1977);

d) *Mississippi Power and Light v. United Gas Pipeline Co.*, J83-0267(R), U.S.D.C., S.D. Miss., where MP&L and intervenor, Miss. P.S.C., obtained a preliminary injunction prohibiting United from improperly calculating powerplant gas prices during pendency of suit, as Ratepayers could not afford hardship of higher fuel adjustment charges. Court recognized that "customers are the real plaintiffs in this case..." and "...this court is the last resort to protect the public interest," since "United's performance under the contract is not subject to the [Mississippi Public Service] Commission's jurisdiction". The suit seeks also $31 million in back charges. Judgment of March 21, 1984.

scope of review of the trial court's decision. Unfortunately, whether or not the court's review of the trial court's denial of permissive intervention should be under an "abuse" test or "clear abuse" test, the mere repetition of this language without an analysis leaves the decision to the trial court, without a meaningful review by the appellate court. A finding of the denial of permissive intervention by the trial court should not be mechanically upheld by an appellate court, exclaiming that reversal is "almost unique."

As the dissenting judges point out, the denial of intervention in this instance "strikes a serious blow against the heralded modern development in law protecting the rights of consumers..." Appendix H at 87. The appellate court, in interpreting Rule 24, has substantially narrowed the application of the Rule and raised the barriers for a potential intervenor to unsurmountable and unworkable heights, contrary to the intent of the Rule. *Cf.* 7A Wright & Miller, *supra* §1911. Guidance of this Court to determine proper standards for permissive intervention is necessary, particularly where this Court has *never* addressed the requirements of Rule 24(b).

CONCLUSION

This case presents issues analogous to those in *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). There, the F.C.C. argued that intervention should be predicated upon invasion of a *legally* protected interest. In rejecting the F.C.C.'s position, Judge, now Chief Justice, Burger perceptively remarked that "consumers are generally among the best vindicators of the public interest" and quoted approvingly from Edmond Cahn:

> Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience." (citation omitted)

359 F.2d at 1005.

In this instance, the Ratepayers and the City simply pray for access to the federal courts, in the absence of another forum to redress the wrongs suffered. They submit that the mere change of corporate domicile of United should not affect their substantive rights and that federal courts should follow the state court decisions based on state law.

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